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Abstract: In 2016, the Office of the Attorney General of Switzerland sanctioned a Swiss corporation for having bribed a Libyan Minister. The same year, it opened a criminal proceeding against the Swiss bank BSI for its involvement in the corruption scandals surrounding the Malaysian company 1MDB. Swiss corporations are also currently under investigation in the Brazilian Petrobras scandal. At the international level, anti-corruption treaties encourage states to make corporations criminally liable for transnational corruption. The OECD Guidelines for Multinational Enterprises provide a detailed standard as to the management that corporations should adopt in order to prevent transnational corruption. This article aims to clarify the OECD due diligence standard. It presents the Swiss emerging practice regarding corporate criminal liability for transnational corruption offences and compares the conditions under which management deficiencies trigger criminal liability in Switzerland, in the United Kingdom, and in the United States.

Swiss Multinational Enterprises and Transnational Corruption: Management Matters

By Nicolas Bueno*

In 2016, the Office of the Attorney General of Switzerland sanctioned a Swiss corporation for having bribed a Libyan Minister. The same year, it opened a criminal proceeding against the Swiss bank BSI for its involvement in the corruption scandals surrounding the Malaysian company 1MDB. Swiss corporations are also currently under investigation in the Brazilian Petrobras scandal. At the international level, anti-corruption treaties encourage states to make corporations criminally liable for transnational corruption. The OECD Guidelines for Multinational Enterprises provide a detailed standard as to the management that corporations should adopt in order to prevent transnational corruption. This article aims to clarify the OECD due diligence standard. It presents the Swiss emerging practice regarding corporate criminal liability for transnational corruption offences and compares the conditions under which management deficiencies trigger criminal liability in Switzerland, in the United Kingdom, and in the United States.

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I. Introduction

Under which conditions can a multinational enterprise be held criminally liable for a corruption offence in its global business operations? This article first presents the international anti-corruption framework. Almost all anti-corruption treaties encourage states to introduce corporate criminal liability for transnational corruption offences (II). The Organization for Economic Co-operation and Development (OECD) goes a step further. Its Guidelines for Multinational Enterprises[1] provide an international due diligence standard that multinational enterprises should apply in order to prevent transnational corruption. Although this article focuses on corruption, the OECD diligence standard presented here applies to the respect of human rights as well.[2] In that regard, it is suggested to read this article in parallel with the recent contribution of *Christine Kaufmann,* Konzernverantwortungsinitiative: Grenzenlose Verantwortlichkeit?, published in this review and in the light of the recent legal development in Switzerland that she describes[3] (III). Finally, this article shows how Switzerland, the United Kingdom, and the United States implement corporate criminal liability for transna-

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1 OECD, Guidelines for Multinational Enterprises, Edition 2011 (hereinafter: OECD Guidelines). Accessible on <*www.oecd.org/daf/inv/mne/48004323.pdf*>.

2 The OECD due diligence standard is defined in Chapter II (General Policies) of the Guidelines and it applies to Chapter IV (Human Rights) as well as Chapter VII (Combating Bribery, Bribe Solicitation and Extortion) of the Guidelines.

3 *Christine Kaufmann,* Konzernverantwortungsinitiative: Grenzenlose Verantwortlichkeit?, SZW 2016, 45–55.

tional corruption offences. It focuses on how domestic courts identify that a deficient management triggers the criminal liability of corporations (IV).

II. Corporate Liability for Transnational Corruption in Anti-Corruption Treaties

International anti-corruption treaties establish and define corruption offences. This article focuses on transnational corruption offences such as transnational bribery and transnational money laundering (II.1). Anti-corruption treaties encourage ratifying states to take measures to hold corporations criminally liable in addition to the liability of natural persons (II.2). The purpose of corporate criminal liability for corruption offences is to avoid liability gaps due to complex internal decision-making processes and to encourage corporations to adopt compliance mechanisms (II.3).

1. Transnational Bribery and Transnational Money Laundering

One particular corruption offence defined by international anti-corruption treaties is the active bribery of public officials. The United Nations Convention against Corruption (UNCAC)[4] defines active bribery as «the promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.»[5] The active bribery of *foreign* public officials is the same offence but applies to officials from any other country.[6] This offence is also referred to as transnational bribery. Transnational bribery is defined in Article VIII of the Inter-American Convention against Corruption[7], Article 5 of the Council of Europe Criminal Law Convention on Corruption[8], and Article 16 of the UNCAC. Furthermore, the bribery of foreign officials is the offence of corruption covered by the OECD Convention on Combating Bribery of Foreign Public Officials[9]. Transnational bribery has been introduced to frame the conduct of multinational enterprises operating abroad. Its purpose is to keep competition rules fair and transparent in international business transactions.[10] Indeed, it is meant to prevent multinational corporations from contributing to corruption or exploiting regulation gaps in foreign countries.

Beyond criminalizing transnational bribery, international anti-corruption treaties, such as the UNCAC and the Council of Europe Criminal Law Convention on Corruption also establish transnational money laundering of proceeds of corruption as an offence. Article 23 UNCAC defines money laundering as «the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action».[11] States parties to the UNCAC shall establish as an offence money laundering of the proceeds of corruption offences, committed both within and outside the jurisdiction of the State.[12]

2. Corporate Criminal Liability in Anti-Corruption Treaties

International anti-corruption treaties recommend ratifying states to take measures in order to hold corporations criminally liable for corruption offences, such as transnational bribery and transnational mon-

4 United Nations Convention against Corruption 2003, entered into force on 14 December 2005. Accessible on <*www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf*>.

5 Article 15(a) UNCAC.

6 United Nations, Legislative Guide for the Ratification and Implementation of the UNCAC, 2nd revised edition 2012, at 206 (hereinafter UNCAC Legislative Guide).

7 Inter-American Convention against Corruption 1996, entered into force on 6 March 1997.

8 Council of Europe Criminal Law Convention on Corruption 1999, entered into force on 1 July 2002.

9 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 (hereinafter OECD Anti-Bribery Convention), entered into force on 15 February 1999. Accessible on <*www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf*>. For a commentary *Mark Pieth and others* (eds.), The OECD Convention on Bribery: A Commentary, Cambridge 2014.

10 Council of Europe, Explanatory Report to the Criminal Law Convention on Corruption, 27 January 1999, at 47 and 48.

11 Article 23(a)(i) UNCAC. See also Article 23(a)(ii) and (b) UNCAC.

12 Article 23(c) UNCAC. See also Article 13 Council of Europe Criminal Law Convention.

ey laundering in addition to the liability of natural persons. Chronologically, Article VIII of the Inter-American Convention against Corruption and Article 2 of the OECD Anti-Bribery Convention were the first international provisions that encouraged states to establish the liability of legal persons for corruption offences. They were followed by Article 18 of the Council of Europe Criminal Law Convention on Corruption. Article 18(1) requires states to adopt legislative measures to ensure that legal persons can be held liable for criminal offences of corruption committed for their benefit by any natural person who has a leading position within it. As *Pieth* explains, this focus on senior company officials' involvement has increasingly become too narrow and inadequate for the modern decentralised structures of large multinational corporations.[13] This is a reason why Article 18(2) adds that legal persons should also be «held liable where the lack of supervision or control … has made possible the commission of the criminal offences». There is no specific provision about corporate criminal liability in the African Union Convention on Preventing and Combating Corruption.[14] Nevertheless, the states parties agreed to strengthen national control measures in order to ensure that the setting up and operating of foreign companies in the territory of a state party be subject to the national legislation in force.[15] Finally, in the last international anti-corruption treaty adopted, the UNCAC, Article 26 states that each state party shall adopt measures to establish the liability of legal persons for corruption offences.

With the exception of the African Union Convention on Preventing and Combating Corruption, all international anti-corruption treaties encourage thus states to make corporations liable for corruption offences. This does not mean that ratifying states agreed to implement criminal corporate liability into their domestic law.[16] For instance, the OECD Commentaries on the Anti-Bribery Convention specify that if «under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.»[17] Parties are only required to «ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.»[18] In the same way, Article 26 of the UNCAC does not impose an obligation on states to introduce a corporate criminal liability for corruption offences. The corporate liability can be criminal, civil, or administrative, thus accommodating various legal systems and approaches.[19]

3. The Purpose of Corporate Criminal Liability

The purpose of corporate liability for corruption offences, such as active bribery or money laundering, in anti-corruption treaties is twofold: to avoid liability gaps and to deter corporations from conducting corrupt transactions. As the Explanatory Report to the Criminal Law Convention of the Council of Europe states: «practice reveals serious difficulties in prosecuting natural persons acting on behalf of these legal persons … [I]n view of the largeness of corporations and the complexity of structures of the organisation, it becomes difficult to identify a natural person who may be held responsible for a bribery offence.»[20] Put differently in the UNCAC Legislative Guide, «decisions leading to corruption can be hard to interpret as they may involve multiple layers of other decisions, making it difficult to say who exactly

13 *Mark Pieth,* Article 2: The Responsibility of Legal Persons, in: M. Pieth and others (eds.), The OECD Convention on Bribery: A Commentary, Cambridge 2014, 212–249, at 221.

14 African Union Convention on Preventing and Combating Corruption 2003, entered into force on 8 May 2006.

15 Article 5(2) African Union Convention.

16 See *Mark Pieth, supra* n. 13, at 225 or *Meg Beasley,* Dysfunctional Equivalence: Why the OECD Anti-Bribery Convention Provides Insufficient Guidance in the Era of Multinational Corporations (Note), 47(1) The George Washington International Law Review 191–231, at 205.

17 OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21 November 1997, at 20.

18 Article 3 OECD Anti-Bribery Convention. See also *Anita Ramasastry,* Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement, in: S. Deva/D. Bilchitz (eds.), Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?, Cambridge 2013, 162–189, at 178.

19 UNCAC Legislative Guide, *supra* n. 6, at 328.

20 Council of Europe, Explanatory Report, *supra* n. 10, at 84.

is responsible or liable».[21] Corporate liability beyond individual liability thus helps prosecuting corruption when internal decisions are taken collectively. It avoids an outcome in which no individual can be found responsible, because corporate decisions are taken collectively, and therefore no liability would be attributable at all.

Furthermore, the criminal liability of a legal entity for corruption offences has a deterrent effect. Criminal liability is attributed to the corporation itself as a punishment for its deficient management. As corporations cannot hide anymore behind complex decision-making to avoid liability, corporate criminal liability forces them to implement compliance procedures to avoid being involved in corruption. It may therefore act as a catalyst for more effective management and supervisory structures to ensure compliance with the law.[22] Corporate liability and compliance are thus becoming increasingly intertwined.[23] Although clear at first sight, international anti-corruption treaties do not provide a practical approach on how to assess what is an adequate or an inadequate management. Part III presents the international OECD standard. The OECD Guidelines for Multinational Enterprises provide recommendations on how a corporation should be managed in order to prevent transnational corruption.

III. The OECD Management Requirements for Multinational Enterprises

Within corporations, bribery may be committed by individuals employed or associated with the corporation, with a subsidiary, or a subcontractor. Foreign bribery is equally committed in at least three ways: by sending employees or contracted consultants abroad, by individuals working in foreign subsidiaries or in foreign subcontractors. At the international level, the OECD Guidelines for Multinational Enterprises recommend multinational enterprises to take measures in order to avoid associated individuals, such as employees, including those in controlled subsidiaries (III.1) or individuals working for suppliers (III.2), commit corruption offences abroad.

By describing the due-diligence that multinational enterprises should adopt, the OECD Guidelines provide an international standard for a *duty to act* in order to prevent and remedy corruption. It is although worth mentioning that the International Organization for Standardization has also very recently adopted the anti-bribery management system standard ISO 37001 that is built on guidance from the OECD or Transparency International.[24] Anti-corruption standards are of great interpretative value for domestic authorities. They enable them to evaluate and compare the conduct of a corporation in a more objective way.

1. Managing Employees Abroad and Controlled Foreign Subsidiaries

The OECD Guidelines recommend that multinational enterprises carry out risk-based due diligence.[25] Due diligence is understood as the process through which enterprises identify, prevent, mitigate, and account for how they address their actual and potential adverse impacts as an integral part of their business decision-making and risk-management systems.[26] Adverse impacts include human rights violations,[27] environmental harm or corruption. Under the concept of due diligence, the Guidelines describe a duty for multinational enterprises to know and to act.

The first duty is to identify a transnational corruption risk from employees abroad and from controlled foreign subsidiaries. Chapter VII of the OECD Guidelines, which relates to corruption, recommends that multinational enterprises develop and adopt adequate internal controls, ethics, and compliance programmes or measures for preventing and detecting bribery. These internal measures must be developed on the basis of a risk assessment addressing the individual circumstances of an enterprise, in particular the bribery risks facing the enterprise such as its geo-

21 UNCAC Legislative Guide, *supra* n. 6, at 315.
22 *Ibid.,* at 316.
23 *Pieth, supra* n.13, at 216.
24 ISO, ISO publishes powerful new tool to combat bribery, <*http://www.iso.org/iso/home/news_index/news_archive/news.htm?refid=Ref2125*>.
25 OECD Guidelines, Chapter II (General Policies), A.10.
26 *Ibid.,* Chapter II (General Policies), Commentary, at 14.
27 On the legal development in Switzerland regarding human rights due diligence, see *Kaufmann, supra* n. 3, at 52. See also *Nicolas Bueno/Sophie Scheidt,* Die Sorgfaltspflichten von Unternehmen im Hinblick auf die Einhaltung von Menschenrechten bei Auslandsaktivitäten, Wien 2015, at 4–6.

graphical and industrial sector of operation.[28] The OECD also adopted Recommendation 2009 for Further Combating Bribery of Foreign Public Officials in International Business Transactions. Annex II of the Recommendation, which provides good practice specifies that ethics and compliance programmes or measures designed to prevent and detect foreign bribery should be «applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries».[29]

Turning to the second duty, multinational enterprises should take measures to prevent the realization of the corruption risk identified. When the corporation causes or contributes to corruption through its own activities, including those of a subsidiary, it should take the necessary steps to cease or prevent its contribution.[30] It should use its leverage to mitigate any impacts to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.[31] For instance, the OECD Guidelines recommend multinational enterprises to promote employee's awareness of and compliance with company policies and internal controls, ethics, and compliance programmes or measures against bribery through appropriate dissemination, training programmes, and disciplinary procedures.[32] The OECD also makes clear that corporate liability should be established when «a person with the highest level of managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.»[33] It also recommends that member countries to the OECD Anti-Bribery Convention ensure that a legal person cannot avoid responsibility by using intermediaries, including related legal persons, such as subsidiaries, to offer, promise or give a bribe to a foreign public official on its behalf.[34]

2. Managing the Relationship with Foreign Suppliers

To avoid causing or contributing to corruption through their own activities includes their activities in the supply chain.[35] In particular, they should not use third parties such as suppliers for channelling undue advantages to public officials.[36] In that regard, ISO 37001 standard follows the same path and applies to bribery by an organization or its employees as well as by business associates.[37] With regard to suppliers, a multinational enterprise has also a duty to know and a duty to act according to the OECD Guidelines.

Where multinational enterprises have large numbers of suppliers, they should identify general areas where the risk of corruption is most significant and, based on this risk assessment, prioritise suppliers.[38] Annex II of the OECD Recommendation 2009 specifies that, like for entities, over which the corporation has effective control, ethics and compliance programmes or measures designed to prevent and detect foreign bribery should apply to business partners such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners. This includes a properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners.[39]

In the context of its supply chain, if the enterprise identifies a risk of causing corruption, then it should take the necessary steps to cease or prevent it.[40] The OECD Guidelines recognize that there are practical limitations on the ability of enterprises to effect change in the behaviour of their suppliers. This depends on the structure and complexity of the supply chain or the market position of the enterprise vis-

28 OECD Guidelines, Chapter VII (Combating Bribery, Bribe Solicitation and Extortion), at 2.
29 OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 9 December 2009, Annex II, at A(5).
30 See OECD Guidelines, Chapter II (General Policies), A.11 and commentary at 19.
31 *Ibid.,* at 19.
32 *Ibid.,* Chapter VII (Combating Bribery), at 6.
33 OECD Recommendation 2009, *supra* n. 29, Annex I, at B.
34 *Ibid.,* Annex I, at C. See also *Pieth, supra* n. 14, at 232.
35 OECD Guidelines, Chapter II (General Policies), Commentary at 17.
36 *Ibid.,* Chapter VII (Combating Bribery), at 1.
37 ISO, *supra* n. 24.
38 *Ibid.,* Chapter II (General Policies), Commentary, at 16.
39 OECD Recommendation 2009, *supra* n. 29, Annex II, A(6). Also *Pieth, supra* n. 13.
40 OECD Guidelines, Chapter II (General Policies), Commentary, at 18.

à-vis its supplier.[41] Nevertheless, appropriate responses with regard to the business relationship may include continuation of the relationship with a supplier throughout the course of risk mitigation efforts; a temporary suspension of the relationship while pursuing ongoing risk mitigation; or, as a last resort, disengagement with the supplier either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the corruption.[42] What is clear is that remaining passive when a foreign supplier is suspected of committing corruption offences is not an option.

IV. The Domestic Implementation of Corporate Liability for Transnational Corruption

According to Transparency International, only four OECD countries are fully implementing and enforcing corporate criminal liability for the active bribery of foreign officials: Switzerland, the US, the UK, and Germany.[43] Russia and China have also taken similar steps to impose criminal liability for bribery of foreign officials committed by legal entities.[44] The following section presents and assesses the main characteristics of the legislation of three countries in which a criminal corporate liability for transnational bribery and transnational money laundering is enforced: the Swiss Criminal Code (IV.1), the UK Bribery Act (IV.2), and the US Foreign Corruption Practices Act (IV.3). It focuses on cases in which management deficiencies triggered the criminal liability of multinational enterprises.

1. Management Requirements in the Swiss Criminal Code

Title seven of the Swiss Criminal Code, which was introduced in 2003, deals with corporate criminal liability. For most offences, corporate liability is subsidiary to individual liability. According to Article 102(1) of the Swiss Criminal Code, a corporation is liable under the conditions that « it is not possible to attribute the offence to any specific natural person. » The corporation is only sanctioned for having inadequate management, rendering it impossible to determine an individual liable within the corporation.[45] In one transnational case, the Swiss Supreme Court was brought to determine whether Nestlé had a subsidiary criminal liability for its inadequate management with regard to the killing of a trade unionist working at a Colombian subsidiary. Although the Court did not decide on the merits of the case, it found that, under Article 102(1) of the Swiss Criminal Code, corporations must clearly define positions, area of competences, and responsibilities as well as hold precise individual working plans.[46]

To the contrary, for corruption offences such as transnational bribery (Article 322^{septies} Swiss Criminal Code) or money laundering (Article 305bis Swiss Criminal Code) corporations have a *primary* criminal liability. According to Article 102(2) of the Swiss Criminal Code, corporations are criminally liable «irrespective of the criminal liability of any natural persons». The condition on which to attribute corporate liability is whether the corporation «is responsible for failing to take *all necessary and reasonable organisational measures* that were required in order to prevent such an offence».[47] Article 102(2) was introduced in particular to comply with international anti-corruption treaties that Switzerland ratified.[48] Accordingly, it imposes a duty to act[49] and aims to sanction an omission to prevent or remedy corruption.[50] Necessary and reasonable organizational measures that must be adopted by the corporation are, among others, to be informed about people or entities hired within the corporation, as well as their instruction and supervision.[51] Furthermore, the extent of the

41 *Ibid.,* at 21.
42 *Ibid.,* at 22.
43 Transparency International, Exporting Corruption: Progress Report 2015: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery, 2015, at 2. See *Ramasastry, supra* n. 18, at 179.
44 *Philip M. Nichols,* The Business Case for Complying with Bribery Laws, 49(2) American Business Law Journal (2012) 325–368, at 363.
45 *Marcel A. Niggli/Diego R. Gfeller,* Article 102, in: M. A. Niggli/H. Wiprächtiger (eds.), Basler Kommentar: Strafrecht I, Basel 2013, 1950, at 1990.
46 Swiss Supreme Court, 6B_7/2014, 21 July 2014, at 3.4.4.
47 Article 102(2) Swiss Criminal Code (emphasis added).
48 *Niggli/Gfeller, supra* n. 45, at 1961.
49 *Ibid.,* at 1995.
50 *Ibid.,* at 1996. See also *Maria Ingold,* La responsabilité pénale d'une société mère suisse en cas d'infraction commise au sein de la société fille à l'étranger, 133 Revue pénale suisse (2015) 228–257, at 238.
51 *Mark Pieth,* Wirtschaftsstrafrecht, Basel 2016, at 68.

due diligence in a particular case is function of the risks within particular industries.[52] In any case, a particular duty of care should be ensured when hiring individuals or entities in regions in which corruption is known to be high.[53] This is what illustrates the *Alstom* case, which was the first establishing the liability of a legal entity for a transnational corruption offence.

In the matter of *Alstom,* the French multinational transport company Alstom appointed foreign consultants to secure and support projects in foreign countries.[54] The Swiss subsidiary Alstom Schweiz AG was responsible within Alstom for the group's compliance with regard to the agreements with foreign consultants. It was supported in its task by the compliance division of Alstom SA at their French headquarters in Paris.[55] Although Alstom group did adopt internal guidelines prohibiting illegal payments of consultants, they did not prevent the foreign consultants using some of the money to illegally influence the awarding of contracts in Latvia, Tunisia, and Malaysia.

With regard to Alstom's management, the Office of the Attorney General of Switzerland found that none of the employees in Alstom Schweiz and a few in the compliance office of Alstom SA had relevant experience in the compliance sector.[56] Moreover, Alstom Schweiz signed consultancy agreements with pure offshore and shell companies, in complete disregard of internal guidelines.[57] The Office of the Attorney General decided that the Swiss subsidiary triggered its corporate liability according to Article 102(2) of the Swiss Criminal Code for its inadequate management, which enabled bribes to be paid in Latvia, Tunisia, and Malaysia.[58] It also concluded that the French parent Alstom SA was responsible as the senior holding company for introducing compliance, issuing the relevant guidelines and instructions, and implementing the entire regulatory framework, including internal checks and, finally, taking necessary action.[59] However, Alstom Schweiz recognized the fact, which enabled the Attorney General to render a summary punishment order. According to the settlement deal,[60] the Attorney General sanctioned the Swiss subsidiary to a criminal sanction of 2.5 million CHF joint with a civil compensation of 36.4 million CHF but closed the proceedings against the French parent company.[61]

With the exception of the Alstom case, it is only very recently, and thus well over a decade after the introduction of corporate liability in the Swiss Criminal Code, that a practice of prosecuting corporations for transnational corruption can be said to be emerging. In May 2016, the Office of the Attorney General convicted the Swiss subsidiary of the Swiss agro-business multinational enterprise *Ameropa* to a criminal fine of 750.000 CHF.[62] It found that, in 2007, the subsidiary paid 1.5 million USD to the then Libyan Oil Minister for ensuring the entrance to the Libyan fertilizer market.[63] With regard to management requirements, the Office of the Attorney General found that the subsidiary acted in violation of internal regulations, directives and codes of conducts; that it did not hire a compliance officer and lacked implementing a specific training program. It concluded thus that it failed to take all necessary and reasonable organisational measures, according to Article 102(2) of the Swiss Criminal Code to prevent the bribery in Libya.[64]

Recently also, the Office of the Attorney General announced that it was investigating the conduct of Swiss multinational corporations in the Petrobras and in the Malaysian company 1MDB transnational corruption scandals. In the first case, it received reports of around 340 suspicious banking relations in relation to the international corruption affair involving the semi-state-owned Brazilian company Petro-

52 *Ibid.,* p. 70.
53 *Niggli/Gfeller, supra* n. 45, at 1996.
54 Office of the Attorney General of Switzerland (hereinafter OAG), Summary Punishment Order, 22 November 2011, EAII.04.0325-LEN, at 2. Accessible to the public on request at the Office of the Attorney General of Switzerland.
55 *Ibid.,* at 3.
56 *Ibid.,* at 4.
57 *Ibid.,* at 6.
58 *Ibid.,* at 10.
59 OAG, Order to Dismiss Proceedings, 22 November 2011, EAII.04.0325-LEN, at 7.
60 *Pieth, supra* n. 51, at 68.
61 OAG, Order to Dismiss Proceedings, 22 November 2011, EAII.04.0325-LEN, at 11.
62 *Natalie Bougeard/Pascal Jeanneret,* Une multinationale suisse condamnée pour corruption sous Kadhafi, in: 19h30 du 19 septembre 2016, accessible online at <*http://www.rts.ch/info/economie/8027589-une-multinationale-suisse-condamnee-pour-corruption-sous-kadhafi.html*>.
63 OAG, Einstellungsverfügung/Strafbefehl, 31 Mai 2016, SV.12.0120-DCA, at 2. Accessible to the public on request at the Office of the Attorney General of Switzerland.
64 *Ibid.,* at 6.

bras. In response, it reported having opened some 60 investigations on suspicion of aggravated money laundering and in numerous cases on suspicion of bribery of foreign public officials.[65] In the second case, the Office of the Attorney General announced the opening of a criminal investigation for transnational bribery and transnational money laundering against the Swiss Bank BSI. It suspects that the offences of money laundering and bribery of foreign public officials currently under investigation in the context of the Malaysian company 1MDB case could have been prevented had BSI been adequately organised.[66] It is hoped that both cases will specify further management requirements for Swiss multinational corporations regarding transnational corruption. This might not necessary be the case. Indeed, in the corruption cases of *Alstom* but also *Ameropa,* the Attorney General rendered summary punishment orders, which are less detailed than first-instance judgments.

2. Management Requirements in the UK Bribery Act

The UK Bribery Act came into force on 1 July 2011.[67] Among other offences, it sanctions active bribery of both national and foreign public officials.[68] Section 7 of the Bribery Act is entitled «Failure of commercial organisations to prevent bribery». Provision 7(1) makes a commercial organization guilty of an offence if a person associated with it bribes another person. The term *associated person* has been preferred to employee in order to broaden the scope of people a corporation must supervise.[69] Therefore, an associated person is any person who performs services for or on behalf of the commercial organization[70] and may be the corporation's employee, agent, or subsidiary.[71] Furthermore, it can be an individual or an incorporated body. For example, where a supplier can properly be said to be performing services for a commercial organization rather than simply acting as the seller of goods, it may also be an associated person.[72] Where the prosecution cannot prove beyond reasonable doubt that an offence of bribery has been committed, a corporate offence will not be triggered. However, as in the Swiss Criminal Code, it is irrelevant whether a natural person has been convicted of such an offence.[73]

Unlike Article 102(2) of the Swiss Criminal Code, provisions 7(1)(a) and (b) require that the associated person intended to obtain or retain business or a business advantage *for the commercial organization.*[74] This should leave corporations unsanctioned when associated persons bribe for their own personal benefit. This may, however, also exclude parent company liability when a bribe is committed by an employee of a subsidiary if it cannot be shown that the employee intended to obtain business for the *parent* company «even though the parent company … may benefit indirectly from the bribe».[75] Practice will have to show how an intent to benefit the corporation can be established. This seems problematic as one reason to introduce corporate liability is rightly to avoid liability gaps when no natural person can be individually identified.

Once the prosecution has proven that a bribe has been committed by an associated person intending to benefit the company, the burden of proof shifts to the

65 OAG, Petrobras affair: Further USD 70 million of frozen assets to be unblocked and returned to Brazil, 17 March 2016, <*https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-61034.html*>.

66 OAG, 1MDB case: criminal proceedings opened against the BSI SA bank, 24 May 2016, <*www.admin.ch/gov/en/start/documentation/media-releases.msg-id-61830.html*>; also *Pieth, supra* n. 52, at 72.

67 *Bram Meyer/Tessa van Roomen/Eelke Sikkema,* Corporate Criminal Liability for Corruptions Offences and the Due Diligence Defence: A Comparison of the Dutch and English Legal Frameworks, 10(3) Utrecht Law Review (2014) 37–54, at 40.

68 Provisions 1(2) and 6 UK Bribery Act.

69 In this review, see *George Pavlides,* La législation britannique contre la corruption: application du Bribery Act aux personnes suisses, SZW 2015, 117–125, at 120; *Meyer/van Roomen/Sikkema, supra* n. 67, at 41.

70 Provision 8(1) UK Bribery Act.

71 Provision 8(3) UK Bribery Act. *Meyer/van Roomen/Sikkema, supra* n. 67, at 42.

72 UK Ministry of Justice, Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010), March 2011, at 16.

73 *Ibid.,* at 9.

74 Emphasis added.

75 UK Ministry of Justice Guidance, *supra* n. 72, at 15 and 17.

company.[76] Provision 7(2) of the Bribery Act offers a defence to the commercial organization if it proves it had implemented *adequate procedures* designed to prevent persons associated with it from undertaking such conduct.[77] The Ministry of Justice provides guidance on such procedures. Among other principles,[78] a periodic, informed, and documented assessment of bribery risks across the organization should first be conducted.[79] External risks can be categorized into country, sectoral, transaction, business opportunities, and business partnerships.[80] Due diligence should be applied when assessing risks. In higher risk situations, due diligence may include conducting direct interrogative enquiries, indirect investigations, or general research on proposed associated persons.[81] Moreover, top-managers are encouraged to commit themselves to bribery prevention.[82] The commercial organization should further seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training.[83] Finally, it should monitor and review procedures designed to prevent bribery by persons associated with it and make improvements where necessary.[84]

It is not clear how this adequate-procedure defence will apply, and to what extent a strong compliance programme may form a bar against corporate criminal liability in practice.[85] It is probable, however, that the compliance programme will be tested and assessed, not for its own sake,[86] but in light of the particular corruption scheme. The adequate-procedures defence should apply when a risk assessment was conducted with due diligence, but nevertheless could not identify or prevent the bribe.

3. Management Requirements in the US Foreign Corrupt Practices Act

Enacted in 1977, the Foreign Corrupt Practices Act[87] (FCPA) was the first statute to criminalize the bribery of foreign public officials.[88] Section 78dd(2) renders unlawful the bribery of foreign officials conducted by any corporation, which has its principal place of business in the United States, or which is organized under the laws of the United States.[89] Section 78dd(3) applies equally to any foreign corporation engaged in any act of a corrupt payment while in the territory of the United States.[90] Under sections 78m(b)(2)(A) and (B), the books-and-records and internal controls provisions, corporations are required to make and keep books that accurately and fairly reflect transactions and to devise and maintain a system of internal controls. In 2015 alone, 12 corporations were sanctioned under the FCPA.[91]

Corporate liability applies when directors, officers, employees, or agents acting within the scope of their employment commit violations intended, at least in part, to benefit the company.[92] The intent to benefit the company is a looser condition than in the UK Bribery Act. It is fulfilled as long as the corporation has or could have been benefitted. With regard to parent-subsidiary liability, there are two ways in which a parent company may be liable for bribes paid by its subsidiary. Either the parent has participated sufficiently in the activity to be directly liable, or it is liable for the subsidiary's conduct when the parent exercises a control over the subsidiary. This control is evaluated in light of the parent's knowledge and direction of the subsidiary, both generally and in the context of the specific transaction.[93] In practice, authorities nevertheless assess the internal manage-

76 *Meyer/van Roomen/Sikkema, supra* n. 67, at 43.
77 Emphasis added. Also *Pavlides, supra* n. 69, at 121.
78 For comments of the six principles, *Meyer/van Roomen/Sikkema, supra* n. 67, at 43–44. Also *Pavlides, supra* n. 69, at 121.
79 UK Ministry of Justice Guidance, *supra* n. 73, Principle 3.
80 *Ibid.,* Principle 3, at 3.5.
81 *Ibid.,* Principle 4, at 4.5.
82 *Ibid.,* Principle 2.
83 *Ibid.,* Principle 5.
84 *Ibid.,* Principle 6.
85 *Meyer/van Roomen/Sikkema, supra* n. 68, at 44.
86 See also *Beasley, supra* n. 17, at 219.
87 Title 15 United States Code, Section 78dd(1) to (3)ff (hereinafter FCPA).
88 *Ramasastry, supra* n. 18, at 196.
89 Paragraph 78dd(2)(h)(B) FCPA.
90 See US Department of Justice and Securities and Exchange Commission, FCPA: A Resource Guide to U.S. Foreign Corrupt Practices Act, 14 November 2012, at 11.
91 Shearman and Sterling LLP, FCPA Digest, Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977, January 2016, at i.
92 Department of Justice and Securities and Exchange Commission FCPA Guide, *supra* n. 90, at 27.
93 See *Beasley, supra* n. 16, at 206.

ment of corporations. They look at whether a deficient management amounted to a violation of the records and control provisions under the FCPA prior to establishing a corporate criminal liability.

In *US v. Alstom SA,* the American criminal authorities prosecuted the same corruption scheme as the Swiss authorities, but in Indonesia, Saudi Arabia, Egypt, and the Bahamas. They found that Alstom hired consultants to conceal and disguise improper payments to foreign officials.[94] According to the plea agreement, Alstom knowingly failed to implement and maintain adequate controls to ensure meaningful due diligence for the retention of third-party consultants although a number of consultants raised *red flags* under Alstom's own internal policies. Indeed, certain consultants had no expertise in the industry-sector project. Others were located in a country different to the project country and some asked to be paid in a currency or in a bank account located in a country different to where the consultant and the project were located. Despite these red flags, the consultants were nevertheless retained without meaningful scrutiny.[95] The company agreed to pay a criminal fine of 772.3 million USD, making it the largest criminal FCPA fine ever.[96]

In the matter of *PBSJ,*[97] the authorities clarified the management requirements of a parent company with regard to suspicious activities within a domestic subsidiary operating abroad. They also found that PBSJ failed to respond to red flags. PBSJ was a construction firm incorporated in Florida. It wholly owned the domestic subsidiary PBSJ International. During 2009, PBSJ International won two multi-million dollar development contracts in Qatar and Morocco.[98] Both were competitively solicited and approved by the Qatari owned company Diar. During the bidding process, PBSJ International's president offered bribes to a director at Qatari Diar, a former colleague, in exchange for confidential bid information. After the award of the contracts, PBSJ International opened a joint account that was accessible to the wife of the Qatari Diar's director.[99] The authorities listed a series of red flags that should have led the parent and the subsidiary to uncover the payment scheme.[100] The red flags included that PBSJ International was known to have been receiving confidential bid information; its president informed multiple PBSJ and PBSJ International employees that he was receiving information from a good friend and top executive of the government ministry responsible for awarding the contract; an officer of PBSJ International learnt of the connections between the foreign official; and finally, a PBSJ employee was aware that certain agency fees were disguised within the initial costs of a project bid. In a settlement, the parent corporation agreed to pay a total sanction of 3.407.875 USD.[101]

The authorities also found that the parent company *Bristol-Myers Squibb Co* (BMS) failed to remedy identified deficiencies within its foreign subsidiary.[102] BMS is a pharmaceutical corporation based in New York and operating in China through its subsidiary BMS China.[103] Certain BMS China employees achieved their sales, in part, by providing health care providers and other government officials with cash and other inducements in exchange for prescriptions and drug listings. In addition to BMS China's failure to respond effectively to red flags, US authorities found that the parent BMS did not *remedy identified deficiencies* and that compliance resources were minimal. Although it was an open secret that health care providers in China relied upon grey incomes to maintain their livelihood,[104] the BMS corporate compliance officer responsible for the Asia-Pacific region was based in the US and rarely travelled to China. BMS's sales force in China received limited training and much of it was inaccessible to a large number of sales representatives who worked in remote locations.[105] BMS was required to pay a total of 14.692.000 USD in sanctions.[106]

94 US District Court, District Court of Connecticut, *U.S. v. Alstom S.A.,* No. 3:14-cr-00246, 22 December 2014, at 26.
95 *Ibid.,* at 31.
96 Shearman and Sterling LLP, FCPA Digest, *supra* n. 91, at 11.
97 *Walid Hatoum,* Admin. Pro. File No. 3-16352, 22 January 2015.
98 *Ibid.,* at 5.
99 *Ibid.,* at 14.
100 *Ibid.,* at 19.
101 Shearman and Sterling LLP, FCPA Digest, *supra* n. 91, at xx.
102 *Bristol-Myers Squibb Co.,* Admin. Pro. File No. 3-16881 (5 October 2015).
103 *Ibid.,* at 2.
104 *Ibid.,* at 7.
105 *Ibid.,* at 9.
106 Shearman and Sterling LLP, FCPA Digest, *supra* n. 91, at 211.

V. Conclusion

Almost all international anti-corruption treaties recommend that states implement corporate criminal liability for corruption offences, such as transnational bribery or transnational money laundering. One purpose of corporate liability is to avoid liability gaps when it is impossible to identify individually responsible persons within a corporation that is taking collective internal decisions. Another is to constrain corporations into adopting and enforcing compliance programmes in order to prevent corruption.

Although many states ratified anti-corruption treaties, very few are enforcing corporate criminal liability for transnational corruption. One reason is the complexity for domestic prosecuting authorities to determine when an inadequate management in a transnational corruption scheme may trigger corporate criminal liability. In that regard, the OECD Guidelines for Multinational Enterprises provide a unique source of guidance. They set the international standard with regard to the management that multinational enterprises should adopt in order to prevent that employees and those in foreign subsidiaries or suppliers commit corruption offences abroad. The Guidelines introduce a clear duty to actively identify risks of corruption in global operations and a duty to take measures to cease and prevent that risk.

In countries where corporate criminal liability for transnational corruption offences is enforced, such as in Switzerland, the United Kingdom, and the United States, prosecutors assess whether a multinational corporation is adequately managed. The domestic legislation and case law in those countries provide precious information about how other countries can enforce anti-corruption treaties. Domestic courts are developing interesting criteria to assess the management of multinational enterprises, such as the experience of individuals working in the compliance office; whether risks have been categorized into country, transaction, business opportunities, and business partnerships; whether internal guidelines are respected; whether employees have been trained on bribery prevention policies; how the corporation has responded to red flags; the amount of compliance resources or what measures have been taken to remedy identified deficiencies.

The few cases presented in this article, however, do not say much about the deterrent effects of the anti-corruption legislation. In Switzerland, for instance, it must be noticed that the practice of corporate liability for transnational corruption offences is only emerging although the legal framework is implemented since 2003. The criminal fines are relatively low, at least in comparison with those in the United States, and the limited practice shows that cases can be settled through summary punishment orders. Nevertheless, the domestic case-law is in line with the OECD guidelines. It makes clear that management requirements for multinational corporations are not confined to prevent corruption risks associated with their own employees but extend to other associated individuals, such as external consultants and individuals within subsidiaries in foreign countries.

In the highly competitive global economy, multinational enterprises are in search of new markets and business opportunities in different countries. In parallel, they operate abroad, either to be closer to the final customer and, or to reduce costs. It is certain that multinational structures are to increase even more in the future. It is thus primordial that domestic authorities continue to gain knowledge about management standards, such as the OECD Guidelines for Multinational Enterprises but also the recently adopted ISO 37001 Anti-bribery management systems standard. The experience gained in the fight against corporate transnational corruption in Switzerland, in the United Kingdom or in the United States is precious. It proves that it is possible to deter and sanction corporate transnational corruption. Finally, it informs the debate about liability of multinational enterprises in other contexts, such as the respect for human rights in global operations.